# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~556.~~ 327

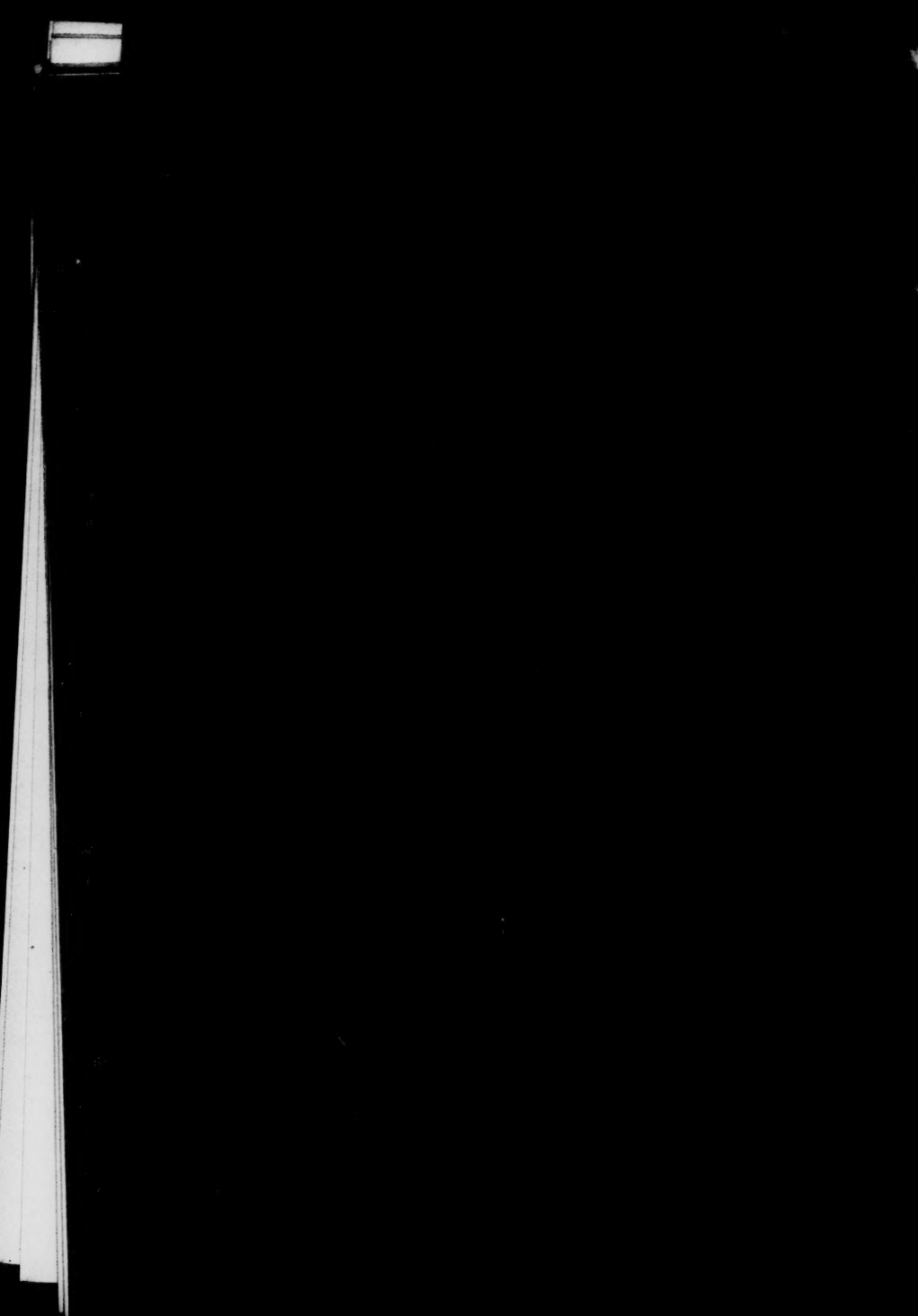
WILLIAM H. WARNER, APPELLANT,

vs.

JAMES F. JOY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

**FILED JULY 29, 1871.**



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INDEX.


| | Original. | Print. |
|---|---|---|
| Bill | 1 | 1 |
| Appearance | 13 | 4 |
| Demurrer of defendant | 14 | 5 |
| Stipulation as to trial, &c | 15 | 5 |
| Demurrer sustained | 17 | 6 |
| Bill dismissed | 17 | 6 |
| Appeal allowed | 18 | 6 |
| Bond for appeal | 19 | 6 |
| Order to certify transcript | 21 | 7 |
| Certificate | 24 | 8 |
| Citation | 24 | 8 |

1 Pleas before the Hon. Samuel F. Miller and Hon. Jno. F. Dillon, judges of the circuit court of the United States for the district of Kansas, at a term of said court begun and held at Topeka, in and for said district, on Monday, the 22nd day of May, A. D. 1871.

WILLIAM H. WARNER, COMPLAINANT,
*vs.*
JAMES F. JOY, DEFENDANT. } 396.

Be it remembered that, on the 1st day of June, 1871, the said complainant, W'm H. Warner, by W'm S. Rockwell, his solicitor, filed in the clerk's office of said court his bill of conplaint; which said bill is in words and figures following, to wit:

UNITED STATES OF AMERICA,
*In the District of Kansas, ss:*

To the judges of the circuit court of the United States for the district of Kansas:

William H. Warner, a resident of Crawford County, State of
2 Kansas, and a citizen of the State of Kansas, brings this, his bill, against James F. Joy, who is a resident of the city of Detroit, and State of Michigan, and is a citizen of the State of Michigan.

And thereupon your orator complains of the said James F. Joy, and says that the said James F. Joy claims to have the legal title to the following lands, to wit: The southeast quarter (S. E. ¼) of section numbered twenty-five, (25,) township numbered twenty-nine (29) south of range number twenty three (23) east of the sixth principal meridian, said land being situate in the county of Crawford, and State of Kansas.

That the said James F. Joy claims to own the said land under and by a patent issued to him on the thirty-first day of October, A. D. 1868; that the said patent was issued under the pretended authority of the 17th article of the pretended treaty made between the United States and the Cherokee nation or tribe of Indians in the year A. D. 1866, and the supplemental article thereto, proclaimed in the year A. D. 1868; said treaty of 1866 was concluded July 19, 1866; ratification advised with
3 amendment July 27th, 1866; amendments accepted July 31st, 1866; treaty proclaimed August the 11th, 1866; the said supplement' article was concluded April the 21, 1868; ratification advised June 6th, 1868; proclaimed June the 10th, 1868; to which treaties, amendments, supplemental articles, ratifications, and proclamations reference is hereby made and prayed to be taken and considered as a part of this bill; that at the time of the making of said treaties and supplemental article thereto, and for a period long prior thereto, the Cherokee nation of Indians had ceased to occupy the lands mentioned and described in said treaty, and had abandoned said lands, by reason whereof the title of the said tribe of Indians had then and had long prior thereto reverted to the United States.

And your orator further avers that, on the 30th day of August, A. D. 1866, one James Harlan, then Secretary of the Department of the Interior, fraudulently conspired with the officers and members of the American Emigration Company, a company incorporated by an act of the legislature of the State of Connecticut, to sell eight hundred
4 thousand (800,000) acres of the said land to the said company, in violation of the terms of the said treaty of 1866, for the purpose of defrauding the said Cherokee Indians, and preventing the same from

being settled upon and purchased under the pre-emption laws of the United States. A copy of the said contract of sale is hereto attached & filed and marked "Exhibit A," and prayed to be taken as a part of this bill.

And your orator further shows that, before the said treaty by and between the United States and the said Cherokee nation or tribe of Indians, proclaimed August the 11, 1866, the said Indians had made a treaty, offensive and defensive, with the so-called Confederate States of America, by which said Indians abandoned their occupation of the land and ceded it to the said Confederate States for the sum of five hundred thousand dollars. One hundred and fifty thousand dollars of said sum was paid down in cash and the balance to be paid at the conclusion of the peace between the United States and said confederacy. Said treaty was made Oct. 7th, 1861. A printed copy of said treaty is herewith filed marked "Exhibit B," and made a part of this bill.

5 And your orator further avers, and shows to the court, that, on the 16th day of June, 1866, the defendant procured an assignment of the contract between Secretary Harlan and said emigrant company to himself; and your orator further shows that, on the 8th day of June, 1868, the said defendant entered into another contract with the then Secretary of the Interior, by which it was stipulated that the said defendant was to purchase the said lands according to the said contract made with the Secretary of the Interior, and assigned to the defendant, subject to slight modifications in respect to the time of payment, which fully appears in said contract. The substance of said contract is embodied in a treaty between the United States and the Cherokee nation or tribe of Indians, proclaimed June 10, 1868.

Your orator avers that it was under this last-mentioned contract that the patent was issued to the defendant, under which he claims title to the land aforesaid; and your orator shows to the court that the land herein mentioned is a part of a tract of eight hundred thousand (800,000) acres conveyed to the Cherokee tribe of Indians by patent of the

6 date of December twenty-eight, 1838, issued to them by the President of the United States, which patent was in due form; that said patent was issued under the authority of a treaty made with the Cherokee nation or tribe of Indians on the 19th day of December, 1835, the said treaty being the same treaty published by the authority of the United States in vol. 7, page 478, U. S. Statutes at Large.

And your orator further avers that there was no other authority of law for the issuing of the patent to the said defendant to the said land herein described than is to be found in the said patents, treaties, and contracts hereinbefore mentioned. And your orator further shows that, on the 5th day of November, 1869, the said land was public land, belonging to the Government of the United States, to which the Indian title before that time had been extinguished; and your orator, having the qualification of a pre-emptor, then and on that day settled upon said land, and took possession of the same, and that your orator has acquired the legal and equitable right to enter the same at the proper land-office, under the pre-emption laws of the United States;

7 that your orator then made settlement on said land for the purpose of entering it under the said laws, and then had, and has ever since had, and now has, open, notorious, adverse, exclusive, and rightful possession of the same.

And your orator avers that at the time he so took possession of the said land the tribe of Cherokee Indians did not live, and have not since lived, within the State of Kansas; that no individual Indians of the

said tribe lived on or near the said land, and that this tract of land was never settled upon by any person until it was taken possession of by your orator; that your orator took possession of said land at the time aforesaid, and has continued to occupy it up to this date, without any objection from the said tribe of Cherokee Indians or any member thereof. And your orator further shows that he is the head of a family and citizen of the United States, and over twenty-one years of age, and that he is not the owner of three hundred and twenty acres of land in any other State or Territory of the United States, nor has he settled on and improved this land for purposes of speculation, but in good faith to
8 appropriate it to his own exclusive use and benefit; that he has not, directly or indirectly, made any contract or agreement in any way or manner, with any person or persons whatsoever, by which the title which he may acquire will enure, in whole or in part, to any person except himself. And your orator further shows to the court that, since he so settled upon the said land for the purpose aforesaid, he has erected a dwelling-house thereon, and made other lasting improvements, of the aggregate value of twenty-five hundred dollars; and that the land in question, without improvements, is of the value of twenty-five hundred dollars; that he has not heretofore had any pre-emption-right; that he did not at any time quit abandon a residence on other land to reside upon this; that said land is not included in any Indian reservation by treaty, law, or proclamation of the President of the United States, nor reserved for saline or mineral lands, nor for any other purpose, and is not section alternate to any section granted to any State of the United States for the construction of any canal, railroad, or other im-
9 provement, nor included in any incorporate town, or site selected for such town. And your orator further shows to the court that there was no public survey of the said land returned to, and approved by, the Commissioner of the General Land Office until the 8th day of June, A. D. 1867, and that no plat or survey of the said lands, made by authority of the United States, has ever been returned to the office of the register & receiver of the said land district, in which said land is situated, or to the office of the surveyor general for said district; but that the only record of said survey is in the office of the Commissioner of the General Land Office at Washington City, and no instructions have ever been given to the register and receiver respecting this land by the Secretary of the Interior.

And your orator further shows that he has been ready and willing, at all times, to make proof before the register & receiver of his settlement and improvements on said lands, and to pay therefor the price of one dollar and twenty-five cents per acre, and has tendered such proof
10 and payment, but the said register and receiver, and each of them, have refused at all times to receive and take such evidence, and receive pay for said land.

And your orator now tenders and offers to make such oath before any officer or person authorized by law to administer the same, and tenders the same to the said register & receiver, and to the Government of the United States; and also makes tender of two hundred dollars, the price of said land, and offers to pay the same as the said court shall direct.

And your orator claims and avers that, by reason of his said settlement and improvements upon said lands, the right has accrued to your orator to enter said land under the pre-emption laws of the United States.

And your orator further shows and alleges that the defendant has commenced an action of ejectment upon the law side of this court for

the purpose of evicting your orator from said land—the issue being now joined and ready for trial; and as by the rules of the common
11 law equitable defences do not avail in actions of ejectment, and the defence set up in said action of ejectment being an equitable one, and your orator being barred from setting up the same, and being remediless at and by the strict rules of the common law:

In consideration whereof your orator prays that the said defendant and his attorneys and counsellors be restrained by an injunction issuing out of and under the seal of this court, from proceeding further against him in the said action of ejectment.

Your orator further prays that the said defendant may be compelled to disclose the interest he has in this land adverse to your orator, and that the court may determine the nature and character of said interest; that the court will, by proper decree, quiet the title and possession of your orator to said premises, and that your orator may have such further and other relief in the premises as may be agreeable to equity and good conscience.

Thereupon will your honors grant unto your orator the writ of subpœna, issuing out of and under the seal of this court, to be directed
12 to the said defendant, James F. Joy, commanding him on a certain day therein named, under a certain penalty, &c., to appear before your honors and answer this bill, and abide the decree of the court.

WILLIAM H. WARNER,
*Complainant.*

W'M S. ROCKWELL,
*Solicitor for Compl't.*
A. L. WILLIAMS,
*Of Counsel.*

(Endorsed:) No. 396. In circuit court, district of Kansas. W'm H. Warner, comp't, vs. James F. Joy, def't. Bill of complaint for injunction. Filed June 1, 1871. A. S. Thomas, clerk.

And on this day, to wit, the 1st day of June, A. D. 1871, came the said defendant, by C. W. Blair, his solicitor, and filed in the said clerk's office his voluntary appearance to plaintiff's bill in the above-entitled cause; which appearance is in words and figures following, to wit:

13 THE UNITED STATES OF AMERICA,
*In the District of Kansas, ss:*

W'M H. WARNER
*vs.*
JAMES F. JOY.

And now comes the defendant above named, by his sol., C. W. Blair, and waives the issuing and service of process in the above cause, enters an appearance for the defendant, being thereto especially authorized, and consents that this cause may be heard upon its merits without delay.

C. W. BLAIR,
*Sol. for Def't.*

(Endorsed:) No. 396. W. H. Warner vs. J. F. Joy. Voluntary appearance of def't. Filed June 1, 1871. A. S. Thomas, clerk.

And on this day, to wit, the 1st day of June, A. D. 1871, came the said defendant, by C. W. Blair, his solicitor, and filed in the said clerk's office his demurrer to complainant's bill in the above-entitled cause; which said demurrer is in words and figures following, to wit:

14 UNITED STATES OF AMERICA,
*In the District of Kansas, ss:*

WILLIAM H. WARNER
*vs.*
JAMES F. JOY.

And the said defendant now comes and demurres to the bill of the complainant herein, and assigns the following causes of demurrer:

1. Because the facts set forth in said bill do not constitute any cause of action against the defendant.
2. Because the facts set forth in said bill are not sufficient to entitle the complainant to any relief in a court of equity, for want of equity in said bill.
3. Because said bill shows that the complainant had a full and adequate remedy at law.

C. W. BLAIR,
*Att'y for Def't.*

I hereby certify that, in my opinion, the foregoing demurrer is
15 well founded in point of law.

WALLACE PRATT,
*Of Counsel.*

So far as rule 31, in relation to demurrers, can be waived by parties, we waive any oath or affidavit to the demurrer filed herein.

W'M S. ROCKWELL,
*Sol. for Complainant.*

(Endorsed:) No. 396. W. H. Warner vs. J. F. Joy. Demurrer. Filed June 1, 1871. A. S. Thomas, clerk.

And on this day, the 1st day of June, A. D. 1871, came the said complainant and defendant, by their solicitors, and filed in the said clerk's office their stipulation as to trial in the above-entitled cause; which stipulation is in words and figures following, to wit:

THE UNITED STATES OF AMERICA,
*In the District of Kansas, ss:*

16 *Stipulation.*

W'M H. WARNER, COMPLAINANT,
*vs.*
JAMES F. JOY, DEFENDANT.

The complainant above named having filed his bill herein, & the defendant having entered a voluntary appearance, and filed a demurrer thereto, it is stipulated and agreed:

1. That this cause may be heard upon its merits without delay.
2. That the court may take and determine the demurrer upon the

agreements heretofore made in the case of Peter F. Holden vs. James F. Joy, and without further argument.

3. That the comp't may hereafter attach to his bill any exhibits referred to therein.

W'M S. ROCKWELL,
*Sol. for Comp't.*
C. W. BLAIR,
*Sol. for Defendant.*

(Endorsed:) 396. W. H. Warner vs. J. F. Joy. Stipulation as
17 to trial. Filed June 1, 1871. A. S. Thomas, clerk.

And afterwards, to wit, at a term of the circuit court of the United States in and for the district of Kansas, begun and held at Topeka, in said district, on Monday the 22nd day of May, A. D. 1871, there were present the Hon. Samuel F. Miller, and Jno. F. Dillon, judges of said court.

At which term of said court, on the 1st day of June, among other proceedings, the following were had and appear of record in words and figures following, to wit:

THURSDAY, *June* 1, 1871.

WILLIAM H. WARNER
*vs.* } 396.
JAMES F. JOY.

This day came the complainant by W. Rockwell, his solictor, and filed his bill of complaint herein; and the defendant, James F. Joy, appeared by C. W. Blair, his counsel, waived the issuing and service of process, entered an appearance thereto, and filed his demurrer to said bill of complaint.

Whereupon this cause came on to be heard on said bill and
18 demurrer, and was argued by counsel, and the court, on mature consideration, and being fully advised in the premises, sustains said demurrer to said bill.

And thereupon the court doth order, adjudge, and decree that the bill of complaint of said complainant stand dismissed.

And it is further ordered that the defendant go hence without day, and recover of the complainant his costs herein expended, taxed at $

To all of which rulings and decisions of the court, the complainant, by his counsel, excepted and excepts.

Whereupon on motion of William H. Warner, complainant, an appeal is allowed him in the above-entitled cause; and the defendant, by his counsel, waived the filing of an appeal bond and also the issuance of a citation to said defendant.

And on this day, to wit, the 20th day of June, A. D. 1871, came W'm H. Warner, the appellant, and filed in the said clerk's office a bond for costs on appeal in the above-entitled-cause; which bond is in words and figures following, to wit:

19 In Supreme Court of the United States.

WILLIAM H. WARNER, APPELLANT,
*vs.* }
JAMES F. JOY, APPELLEE.

Know all men by these presents that we, William H. Warner, as prin-

cipal, and B. P. McDonald, as surety, are held and firmly bound unto James F. Joy, of the city of Detroit, Michigan, in the sum of two hundred dollars, to be paid to the said Joy, his executors, or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and *and* each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 15th day of June, A. D. 1871.

Whereas the above-named William H. Warner, hath taken an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled action, by the circuit court of the United States for the district of Kansas:

20 Now, therefore, the condition of this obligation is such, that if the above-named W'm H. Warner shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

W'M H. WARNER. [SEAL.]
B. P. McDONALD, [SEAL.]
*Fort Scott, Kansas.*

Signed, sealed, & delivered in presence of—
B. S. HENNING.

(Endorsed:) No. 396. Supreme Court. W'm H. Warner, appellant, vs. James F. Joy, ap'ellee. Bond for costs on appeal.

Approved June 17, A. D. 1871, and I do hereby certify that the within-named McDonald, is known to me to be perfectly responsible for the within-named amount.

MARK W. DELAHAY,
*Associate Justice of the Circuit Court for the District of Kansas.*

Filed June 20, 1871.

A. S. THOMAS, *Clerk.*

21 And on this day, June 20, 1871, came the said appellant, and filed an order to certify up transcript in the said clerk's office, in the above-entitled cause; which order is in words and figures following, to wit:

WILLIAM H. WARNER, APPELLANT,
*vs.*
JAMES F. JOY, APPELLEE.

The appellant, having prayed an appeal in open court, and the same having been allowed by the court upon the filing with you a bond in the above-entitled cause, this day approved by me, you will proceed to certify and make *note* [return] to the Supreme Court of the United States a transcript of the record, proceedings, & entries made in the above-entitled cause, as by law and the rules of said court required.

MARK W. DELAHAY,
*Associate Justice of U. S. Circuit Court for the District of Kansas.*

To A. S. THOMAS, Esq.,
*Clk of the Circuit Court for the District of Kansas.*

22 (Endorsed:) No. 396. Supreme Court. W'm H. Warner, appellant, vs. James F. Joy, appellee. Order to certify up transcript. Filed June 20, 1871. A. S. Thomas, clerk.

23 UNITED STATES OF AMERICA,
*District of Kansas, ss:*

I, A. S. Thomas, clerk of the circuit court of the United States for the district of Kansas, do hereby certify the foregoing transcript to be a full, true, and perfect copy from the record of all the proceedings had in said court, in the case of William H. Warner, complainant, against James F. Joy, defendant, as the original now remains in my custody.

In testimony whereof I hereunto set my hand and affix*ed* the seal of said court, at my office, in Topeka, in said district of Kansas, this 26th day of June, A. D. 1871.

[SEAL.] A. S. THOMAS, *Clerk.*

24 Supreme Court of the United States.

WILLIAM H. WARNER, APPELLANT,
*vs.*
JAMES F. JOY, APPELLEE.

By the honorable the district judge of the United States for the district of Kansas to James F. Joy, greeting:

Whereas William H. Warner has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Kansas, made in favor of you, the said James F. Joy, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at Leavenworth, in the district of Kansas and circuit of Kansas, the 17th day of June, in the year one thousand eight hundred and seventy-one.

MARK W. DELAHAY,
*Associate Justice of the U. S. Circuit Court for the District of Kansas.*

25 A copy of the within citation served upon me this 19th day of June, A. D. 1871.

C. W. BLAIR, *Sol'r for Def't.*

(Endorsed:) No. 396. Supreme Court. W'm H. Warner, appellant, vs. James F. Joy, appellee. Citation. Filed June 20, 1871. A. S. Thomas, clerk.

(Indorsed:) W'm H. Warner, appellee, vs. James F. Joy, appellant. Transcript. W'm. S. Rockwell, sol. for appellee. C. W. Blair, sol. for ap'l'nt.

(Indorsement on cover:) No. 556. William H. Warner, appellant, vs. James F. Joy. Kansas C. C. U. S. Filed 29th July, 1871.